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ABSTRACT

A review of legal decisions provides thought-provoking considerations for administrators who want to deter drug use on campus. The United States Supreme Court has recognized that even a limited search of students is a substantial invasion of privacy, but also that school officials need to maintain school discipline. Guidelines for the reasonableness of a search, and its legality, consist of deciding whether the search was justified at inception, reasonably related to the objective, and not excessively intrusive in light of the infraction or the age and sex of the student. A public-school policy stating that lockers are the property of the school lessens expectation of privacy. Similarly, on school-sponsored trips students can be informed that rooms are subject to search. Strip searches for relatively minor offenses are difficult to defend. The establishment of a drug problem before drug testing is wise. Urinalysis drug testing, based on individualized suspicion or to lessen risk to athletes is more likely to pass constitutional muster, but not random suspicionless drug searches. "Vernonia School District v. Acton" has set precedents for drug testing of student groups. "Horton v. Goose Creek Independent School District" established that drug-dog sniff searches of lockers and cars did not constitute a search, but would for people. (Contains 22 references.) (RKJ)

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Student Searches, Urinalysis and Drug Dogs

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Student Searches, Urinalysis, and Dog Sniffs

The United States Supreme Court has recognized that even a limited search of students is a substantial invasion of privacy (New Jersey v. TLO, 1985). However, the court recognized the need of school officials to effectively maintain school discipline. In establishing this balance, the court also recognized that the school setting is unique. Consequently, the court established that the legality of a search of a student should depend simply on the reasonableness of the search, depending on the circumstances. A search is legal under the following guidelines: 1) the search was justified at inception, 2) the search was reasonably related in scope under the circumstances which justified the search in the first place, 3) the search was reasonably related to the objective of the search, and 4) the search was not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

A search is justified at inception when reasonable suspicion indicates that the search will reveal evidence that the student has violated the law or school rules. An example of reasonable suspicion includes a teacher or other school employee witnessing a student violating school rules. Reasonable suspension can also be established when school officials receive first-hand information from a student, parent, or other member of the school community regarding individual students, or when a student is the only person (or one of a very few students) present at the time of the rule violation (Simpson, 1992). However, school officials should weight the credibility of the information before making a decision to search. Reasonable suspicion may not be required when a student voluntarily submits to a search, in emergency searches, or searches of lost property (Yell, 1998).

Even when reasonable suspicion is established, the scope of the search should relate to the rule violation and should not be overly intrusive considering the possible offense (Yell, 1998). As an example, the District Court in Rhode Island (Bousseau v. Town of Westerly, 1998) upheld the pat down search of sixth grade students in a school cafeteria. School officials discovered a large knife missing from the cafeteria. After exhausting all other means, school officials patted each student down as they left the cafeteria. In this particular incident, the search was determined to be reasonable, minimally intrusive, and the pat down search was the most effective method of insuring school safety under the circumstances.

In a wider interpretation of reasonable, the Eighth Circuit upheld the search of all male students in a small rural high school. After a report of some slashed seats on a school bus, the principal used a metal detector to search all male students for a knife. During the search, students were ask to empty their jacket pockets. One jacket pocket reveled a book of matches, a matchbox, and a cigarette package. A white substance, later determined to be crack cocaine, was found in the matchbox. Even though no weapons were found, the search was found to be reasonable under the circumstances, and the student's expulsion for drug possession was upheld by the court (Thompson v. Carthage School District, 1996).

Students can be disciplined for refusing a reasonable cause search. For example, the Fourth Circuit Court upheld the suspension of a student for refusing a search of his backpack. The court found that school officials had developed reasonable individualized suspicion, not by way of any particular information, but rather by the process of elimination (DesRoches v. Caprio, 1998).

Student Lockers

Student lockers have traditionally been subjected to search for any reason. However, two recent court decisions illustrate the wisdom of a clear policy and reasonable suspicion before searching individual student lockers. A U. S. District Court in Kansas found that a school policy stating that lockers were the property of the school resulted in a lowered expectation of privacy. Consequently, district personnel had sufficient grounds to search a student's locker in light of probability of finding missing contraband (Singleton v. Board of Education USD 500, 1995). Similarly, an Ohio Appellant Court upheld the search of a student locker and a book bag in the locker after a teacher witnessed the student smoking cigarettes on school property. The teacher believed he also smelled marijuana. However, the court questioned the legality of a blanket school policy, based on state law, that provided for the random search of student lockers without regard to reasonable cause (In re Adam, 1997).

Student Trips

Student field trips and over night trips are another source of concern for school administrators. Generally, students on school sponsored activities are governed by the same rules and regulations that apply to students on school property. For example, a search of a student's motel room that revealed alcohol and significant quantities of marijuana was recently upheld by a New York District Court. The search was reasonable based on the facts that students had been asked to sign waivers agreeing not to use or possess illegal substances, students had been informed that rooms were subject to search, and most significantly, the principal smelled marijuana around a cluster of students outside one of their rooms (Rhodes v. Guarricino, 1999). The search of student luggage

before a field trip was also supported by the Superior Court of New Jersey. The court believed that a legitimate interest in preventing students from taking contraband on field trips justified the search (Desilets v. Clearview Regional Board of Education, 1993).

Strip Searches

Strip searches for relatively minor offenses are difficult to defend. For example, the strip searching of several seventh grade girls in search of $4.50 was not supported by the District Court in Indiana (Oliver v. McClung, 1995). The strip searching of several high school students in search of a missing ring was not supported by the Court of Appeals of New Mexico (Kennedy v. Dexter Consolidated Schools, 1998). The Eleventh Circuit court questioned the wisdom of the strip-searching of two eight-year-old second graders. The girls were strip searched twice by a teacher and counselor in search of a missing $7.00 (Jenkins v. Talladega City Board of Education, 1997). However, courts can be supportive when a compelling reason is present, students are required to only partially disrobe, the search is minimally intrusive, and the search is conducted in relative privacy (Rhodes v. Guarricino, 1999).

Urinalysis

In an effort to combat drug use among students, several school districts have instituted a policy of urinalysis. Courts have generally been supportive of reasonable suspicion drug testing requirements. For example, the Seventh Circuit upheld a school administrator's ordering of medical assessment of a student based on a supervising teacher's suspicion that he was under the influence of an illegal substance while attending an after school smoking cessation program (Bridgman v. New Trier high School District, 1997).

However, some discretion is clearly required. For example, the Third Circuit Court recently overruled a District Court decision regarding student urinalysis (Gruenke v. Seip, 2000). A high school swim team coach, suspecting a team member to be pregnant, required a pregnancy test of the suspected student before he would allow her to continue on the team. The student and her mother sued the coach alleging, among other things, violation of the student's Fourth Amendment rights and interference with privacy regarding personal matters. The suit also included claims under Pennsylvania tort law. The District Court granted summary judgement in favor of the coach on all counts. However, the Circuit Court reversed the lower court decision in respect to the student's Fourth Amendment and privacy regarding personal matters claims. The court also reversed the lower court's dismissal of the Pennsylvania State tort claim.

The Seventh Circuit reversed a lower court decision supporting the suspionless drug testing of students suspended for fighting. The judges on this panel were concerned that this case could lead to the suspionless drug testing of all students and made an effort to avoid this slippery slope. The court clearly believed that drug testing based on individualized reasonable suspicion was well within the bounds of administrator prerogatives. However, simply being suspended for fighting did not provide the individualized suspicion necessary to negate student's Fourth Amendment rights (Willis v. Anderson community School, 1998).

The issue of random suspionless drug testing of student groups was first addressed by the Supreme Court in *Vernonia School District v. Acton* (1995). This particular case involved student athletes in Vernonia School District. School administrators established that student athletes were the leaders of the drug culture, and

after several failed attempts to curb the problem, resorted to the random drug testing via urinalysis of students participating in athletic contest. The court found that the collection of urine is a search and a reasonable nexus between the search and the need to maintain order in the school must be established for the search to pass constitutional muster. In this particular case the court found that the search was reasonable for several reasons: 1) student athletes have a diminished expectation of privacy, 2) the privacy interest compromised by the process of obtaining urine samples under the policy were negligible, 3) the district had established that student athletes were leaders of the drug culture, 4) the severity of the need was established, and 5) the demonstrated increased risk of injury. However, Justice Scalia, in his majority opinion, cautioned against the assumption that suspicionless drug testing will readily pass constitutional muster in other context.

Because of the court's decision in *Vernonia*, many other districts have instituted similar policies. Some districts have taken the leeway granted in *Vernonia* to include students in all extracurricular activities, not just student athletes. For example, the Seventh Circuit upheld a lower court decision supporting the random, suspionless drug testing of all students involved in extracurricular activities as well as those students driving to school (Todd v. Rush County Schools, 1998). The testing included alcohol, illegal drugs, and nicotine. In spite of the district's inability to demonstrate a correlation between these groups of students and drug/alcohol use, the court believed that *Vernonia* had substantially lowered the bar for student privacy.

The Seventh Circuit was again faced with a case involving the random, suspionless drug and nicotine testing of groups of students. Penn-Harris-Madison (Indiana) School Corporation adopted a drug testing policy, including alcohol, illegal

drugs, and nicotine of a wide range of student groups. These groups included all students involved in extracurricular activities, drove to school, voluntarily submitted to the pool, suspended for three consecutive days for student misconduct, and all students for which there is a reasonable suspicion of drug, alcohol, or tobacco use. Students in the first two categories brought suit.

The Justices hearing this case were concerned about this policy. In fact, during oral arguments district council admitted that the goal of the policy was to test all students on a random, suspionless basis. The Justices reluctantly upheld this policy, except for the nicotine testing of students driving to school, based solely on the precedence established by the Seventh Circuit in *Todd*. The Justices made it clear that if not for the previous ruling and the strong concept *of stare decisis*, this policy would not pass constitutional muster.

The Colorado Supreme Court, similarly disposed but not bound by precedence, over turned a trail court decision that upheld a drug testing policy similar to *Todd v. Rush* (Trinidad School District No. 1 v. Lopez, 1998). School policy required a signed agreement from all students in grades 6-12 participating in extracurricular activities, including marching band and cheerleading, agreeing to random urinalysis. The policy also allowed for the testing of students when reasonable cause existed to suspect illegal drug use. Lopez, a member of the marching band, challenged the requirement that students enrolled in band must submit to random testing (Trinidad School District No.1 v. Lopez, 1998). The Colorado Supreme Court gave weight to three factors that distinguished this policy from *Vernonia*; 1) the policy included students enrolled in for-credit classes, 2) the policy included student groups not demonstrated to have contributed

to the drug problem, and 3) there was no demonstrated risk of immediate physical harm to members of the marching band. The court also rejected the district's argument that members of extracurricular programs were "role models" and consequently had diminished expectations of privacy. The court also rejected the district's argument that random testing of these groups of students was the most efficacious method of addressing the growing drug problem.

The Western District Court of Oklahoma ruled on a similar case (Earls v. Board of Education of Tecumseh Public Schools, 2000). The Tecumseh School District adopted a policy that required students in all extracurricular activities, including band, choir, FHA, FFA, Cheerleaders, and competitive athletics submit to random suspionless drug testing. The District Court supported, under the *Vernonia* standard, the random drug testing of students involve in competitive athletics and when reasonable suspicion of drug use was present. However, the court issued a permanent injunction enjoining the District from enforcing the provisions of the policy requiring suspicionless testing of students engaged in non-athletic activities. The Tenth Circuit Court upheld the lower court decision regarding student athletes (Earls v. Board of Education of Tecumseh Public Schools, 2001).

Drug Dogs

The quest for drug free schools has included the assistance of local law enforcement drug detection dogs. The Fifth Circuit clarified the fundamental legal guidelines to dog sniff searches in *Horton v. Goose Creek Independent School District* (1983). The court established that dog sniff searches of lockers and cars did not constitute a search and, consequently were legal at any time. However, reasonable justification was

necessary to further proceed in the search. Reasonable justification is obtained when the dog alerts to a particular car or locker. Further, the dog must be shown to be "reasonably reliable" for the search to continue. However, the random, suspionless dog sniff of persons is not permissible and constitutes a violation of students Fourth Amendment rights.

Two recent cases follow the premise of *Horton* and provide some guidance. In Commonwealth of Pennsylvania v. Cass (1998), the Supreme Court of Pennsylvania upheld the legality of a drug sniff dog search of student lockers. The court found that student privacy expectations regarding lockers was minimal. Student expectations were further diminished in light of a school policy that school lockers were the property of the school and were subject to search. The fact that the dog alerted to specific lockers provided reasonable cause for further search and any evidence found in the locker was admissible in court. Further, the school demonstrated heightened awareness of drug activity and the use of a drug sniff dog to be an efficacious means of dealing with the problem. The Ninth Circuit affirmed a lower court ruling that found the close sniffing of a person to be offensive whether the sniffer is canine or human. Consequently, the random and suspionless dog sniff search of high school students violated student Fourth Amendment rights (B. C. v. Plumas Unified School District).

Implications

General Implications

- Controversy, and litigation, usually results when school officials fail to follow two rules: 1) when in doubt, don't and 2) if at first you do not succeed, stop.

- Provide training for all staff in the legal requirements of student searches. The training should include examples of "minimally intrusive" searches and stress the importance of the relationship between the reason for the search and the scope of the search.
- Forbid strip searches of students except in compelling circumstances. Even then, school policy should clearly outline the permissible scope of the search.
- Establishing the efficacy of random, suspionless searches before policy implementation makes these policies more defensible.
- The establishment of a drug problem before adopting urinalysis or dog search polices makes these policies more defensible.
- Urinalysis polices should follow current case law established in the Circuit in which the district resides
- Provide a copy of all search polices to parents, law enforcement, students, and staff. Administrators should attend booster club, PTA, and other parent organization meetings to discuss and clarify school search policies.
- When using drug sniff dogs, make sure the dog is certified and the training of both the dog and the handler is current.

Policy Implications

- Outline the circumstances under which students may be subjected to search
- Delineate who may conduct student searches
- Establish that school lockers are property of the school district and are subject to search.

- When and under what circumstances will student automobiles on school grounds be subject to search
- Urinalysis polices should carefully define the student population subject to random, suspionless search, the method of collection and how positive results will be verified and used.
- Establish a clear policy of reasonable cause drug testing
- The use of drug sniff dogs should be outlined in policy. The policy should include when dogs will be used, what will be subject to search, and establish that a dog alert will provide reasonable cause for continued search.
- Establish the circumstances law enforcement may be involved in student search on school grounds.

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